STRAITS SETTLEMENTS REPORTS.

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[APPELLATE CRIMINAL JURISDICTION]
McELWAINE, C.J., WHITLEY & MILLS, JJ.
December 17, 1936.

REX
v.
SEOW PNG.

[SINGAPORE CASE No. 5 of 1936].

Criminal Law—armed robbery without hurt —punishment—Penal Code, S. 397.

Where an accused person is convicted under Section 397 of the Penal Code of armed robbery without causing hurt the Court has no power to award whipping with a cat o'nine tails in addition to rigorous imprisonment.

CASE stated by Clark, J. for consideration by the Court of Criminal Appeal under Section 319 of the Criminal Procedure Code.

Goho for the Accused.

Walters D.P.P. for the Crown.

The judgment of the Court of Criminal Appeal consisting of McElwaine, C.J., Whitley & Mills, JJ., was delivered by—

MCELWAINE, C.J.—This is a case stated by Clark, J. under s. 319 of the Criminal Procedure Code.

Seow Png was charged at the Singapore November Assizes, 1936 "That you, Seow Png on or about the 3rd day of September 1936, at Singapore committed gang robbery of two chandu pipes, $22 in cash and other chattels in the possession of Tan Sin and his wife Sen Ho and at the time of committing the said offence you used a deadly weapon, to wit, a knife and thereby committed an offence punishable under section 397 of the Penal Code."

The case states that the evidence disclosed that accused was armed with a knife with which he threatened people while he and others robbed them.

No wound was inflicted with this knife.

A woman was, however, seized by the neck and partly choked to prevent her calling out.

The jury was not satisfied that more than four persons took part in the robbery so the accused was convicted not of gang robbery but of armed robbery under s. 397 of the Penal Code. He was sentenced to seven years R.I. and twelve strokes of the cat o' nine tails.

The judge stated this case because after sentence a doubt arose in his mind as to whether the sentence of whipping was lawful.

The punishment for ordinary robbery is rigorous imprisonment for a term not exceeding 10 years. Penal Code section 392.

But if the robbery takes place on the highway between sunset and sunrise the imprisonment may be 14 years and the culprit may also be whipped with the cat o' nine tails or rattan.

If in committing robbery hurt is caused whipping with cat or rattan may also be awarded. Penal Code section 394. In the present case hurt within the meaning of section 319 was caused to the woman who was partly choked, but this was not charged, nor, from the case stated can we infer that the choking was done by the accused, nor are we in a position to say that it was done with a common intent so as to make Seow Png responsible under sections 34 or 35. If hurt is alleged as an ingredient of an offence under s. 397 it should be expressly alleged in the charge, *R.* v. *Bright*, (1916) 2 K. B. 441. The case therefore is, is armed robbery without hurt whether simple or grievous punishable with whipping? We think that it is not.

The section appears to us to be one which relates back to other sections. It speaks of "*the* imprisonment." To ascertain the maximum imprisonment that can be awarded one must refer to sections 392, 394, 395 or 396.

The concluding words of the section "and any whipping shall be with a cat o' nine tails" were added by Ordinance No. 25 of 1919.

If whipping was intended for mere armed robbery one would expect these added words to be "and shall also be liable to whipping with a cat o' nine tails" as in the concluding words of s. 396 which was amended by the same Ordinance No. 25 of 1919.

"*Any* whipping," like 'the imprisonment' appears to us to relate back to earlier sections. It merely described the instrument with which the whipping is to be done if it is awarded: it does not in itself authorize whipping. The sections which expressly state that the prisoner shall be liable to whipping are section 392 if the robbery is on the highway between sunset and sunrise; section 394 if hurt is caused.

We are therefore of opinion that on the true construction of this section whipping cannot be awarded unless hurt has been done, or unless the robbery took place on the highway between sunset and sunrise.

We cannot say that this result was not what the Legislature intended, but it may be worthy of the consideration of the Legislature whether a robber who subdues his victim by the threat of instant death or hurt at the point of a deadly weapon is not as deserving of whipping as the robber who effects his purpose by a slight blow.

The sentence of whipping is set aside. The sentence of seven years rigorous imprisonment of course stands.

Sentence partly set aside.

[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C. J.
January 28, 1937.

RE ENA MOHAMED TAMBY DECEASED.

[SINGAPORE ORIGINATING SUMMONS No. 178 of 1936]

Mohamedan marriage agreement.

A Mohamedan intending husband and wife can enter into an agreement in contemplation of marriage. By such an agreement the wife can agree to her exclusion from her share in her husband's estate on his decease, *semble*, either wholly or in part. Similarly by such agreement the husband can bar himself of his freedom to dispose of his whole estate by will.

ORIGINATING SUMMONS.

Withers Payne for applicant, Oomah Meidah, the widow of the deceased.

Cobbett for the next of kin of the deceased.

The facts and arguments sufficiently appear from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—In this Originating Summons the applicant Oomah Meida binte Hadjee, widow, is the administratrix and one of the lawful widows of Ena Mohamed Tamby.

On 30th March, 1902 Ena Mohamed Tamby made his will. On the 4th November, 1903 he married the applicant and on that date he made a marriage agreement by means of an entry in the register of the Imam, celebrating the marriage of which the following is agreed to be a correct translation:—

"May God Help.

Hajira year 1321 Shaaban 15th, corresponding to the 4th November, 1903, Thursday night, I married Meida binte Achee.

I direct my executors to pay a sum of $300 as a gift to the aforesaid person after my death, and also to buy an attap house for her at the cost of $150–. I also direct them to pay her $5–. and half a picul of rice monthly for her maintenance (as long as she remains unmarried). In the event of her remarrying my executors shall not pay her the said maintenance.

She (Meida binte Achee) has no more interest in my property (estate).

There is a note to this effect in the marriage register book kept by Imam Haji Abdul Gany.

Sd. E. Mohamed Tamby."

On 2nd December, 1903 Ena Mohamed Tamby died without having altered his will. He left surviving two widows—the applicant being one. The will was proved on 27th June, 1904 by one of the executors therein named. On 5th September, 1904 the executor paid to the applicant the two sums of $300 and $150 mentioned in the agreement above set out, but no payment was made to her in respect of the $5 and half picul of rice for monthly maintenance. About three years after the death of Ena Mohamed Tamby the applicant remarried and in 1915 again became, and has since remained, a widow.

In 1925 the will was by order of the Court declared to have been revoked by the marriage with Oomah and letters of administration of the estate of Ena Mohamed Tamby were granted to the British Malaya Trustee and Executor Co., Ltd. on behalf of the applicant (Oomah Meida binte Hadjee). In the same case it was decided that the agreement was not a testamentary disposition. See (1931) S.S.L.R. 3.

On 5th June, 1931 the letters of administration granted to the British Malaya Trustee and Executor Co., Ltd., were revoked, and a grant of letters *de bonis non administratis* was granted to the applicant.

Mr. Cobbett's clients were not before the Court in 1925, but it is agreed that the agreement of 4th November, 1903 was a valid marriage settlement.

The question for determination under this Originating Summons is—Is the applicant entitled to her one-sixth share of the estate of the now intestate Ena Mohamed Tamby as one of his two lawful widows, and if so must she bring into account the $450 which she received from the executor who proved the will which has since been set aside. She also claims the allowance for maintenance at $5 per month and $1.50 per month the equivalent of half a picul of rice per month from 3rd December, 1903 up to date.

It is agreed that this claim for monthly maintenance is not statute barred.

It is clear from the marriage agreement that the applicant was only entitled to monthly maintenance for so long as she remained unmarried. The date of Oomah's second marriage is not stated with precision. As maintenance was not paid up to or when the two sums of $300 and $150 were paid on 5th September, 1904 it is possible she had remarried before that date. In an affidavit she said she remarried "about three years after the death of" Ena Mohamed Tamby.

Dr. Withers Payne suggested, and I think Mr. Cobbett accepted the suggestion, that the remarriage should be taken as having occurred two years after the death of Ena Mohamed Tamby.

Accepting this as a fact, the applicant Oomah Meida binte Hajee is entitled to retain out of the estate in her hands as administratrix the sum of $156, being the equivalent of $5 and half a picul of rice per month for two years.

The first question to be decided is—is the applicant entitled to a widow's share in the intestate's estate having regard to the terms of the marriage agreement or settlement?

It appears from the report in 1931 S.S.L.R. 3 that the original Mohammedan marriage register containing the agreement has been lost, but it appears from the last three lines of the report at page 10 that there was evidence before Sir William Murison that Oomah had signed the agreement. In two affidavits in the present matter Oomah signed by a mark.

Dr. Withers Payne's submission was that Oomah is entitled to a widow's one-sixth share, but that the $450 she has received should be set off against it. He also submitted that she is not bound to bring the $156 maintenance money into

account and that this latter sum should not be deducted from the one-sixth share.

Mr. Cobbett's submission was that she had no right to the widow's share.

The most important words in the marriage agreement (made apparently immediately *after* the marriage) are "she has no more interest in my property (estate)."

The gifts to Oomah under this marriage agreement fall into two classes. The two sums of $300 and $150 are certain definite amounts: while the maintenance money is in the nature of an annuity.

Of the former class it is stated in paragraph 840 of Vol. 10 of *Halsbury* (Hailsham Edition) "if by a settlement the husband covenants that his executors shall pay a certain sum to his wife and he subsequently dies intestate, the sum is to be taken in satisfaction, or part satisfaction, as the case may be, of her rights under his intestacy:" and again in the same paragraph it is stated "if the covenant by the husband is entire and indivisible, it does not bar, even *pro tanto*, the widow's rights under his intestacy where those rights are different from the rights secured by the covenant, e.g. a covenant to pay an annuity does not bar her right to her distributive share of his estate, nor can the estimated value of the annuity be set off against such share."

Now it appears to me that if the clause about maintenance had not been interposed between the gifts of $300 and $150 on the one hand, and the phrase "she has no more interest in my property (estate)" on the other, she would, if the agreement is binding upon her—and it has not been suggested that it is not binding—be barred from any share under the intestacy. Does the interposition of the maintenance allowance make any difference? Taking these directions to be covenants neither of them creates a present debt to the wife which cannot be set off against the wife's share. Neither class of gift becomes property of the wife until after the husband's death. If she died in his life time her expectancy would be extinguished but no property would pass on her death.

But I think that the passage in *Halsbury* about a present debt not being capable of being set off against the wife's share in intestacy is only intended to apply when the wife has a share in the intestacy. In *Gurly* v. *Gurly* 8 Cl. & Fin., 743 a present debt created by a marriage settlement was held to bar the widow's right to a share in the intestacy because the settlement expressly said so.

Couch v. *Stratton* 4 Ves. Jun., 391 turned on the words of the settlement. The settlement did not provide that the interest the wife was to take under it was to be in lieu of her share under the Statute of Distributions. The case merely decided that the widow's share under the statute was not a satisfaction or performance of the covenant in the settlement.

The settlement was a gift of an annuity to the wife. To the same effect is *Salisbury* v. *Salisbury*, 6 Hare, 526. In this latter case so far from the settlement being expressed to be in lieu of the widow's share or interest in the estate of the husband, the husband in the settlement covenanted that he would by will "bequeath and secure to her the said annuity of £500 *at the least*, as aforesaid." The Vice Chancellor Sir James Wigram said "In the case, however, of a covenant to pay a gross sum, the question, as Sir Thomas Plumer has said, in *Goldsmid* v. *Goldsmid* (1 Swanston, 217) is no longer open. Lord Eldon, in reasoning on the case of *Garthshore* v. *Chalie* (10 Ves. Jun. 1.), noticed, as the ground of his decision, that this Court had infused into the construction of the husband's contract considerations which a Court of law could not. He said. that the case of *Blandy* v. *Widmore* (1 P. Wms. 324), and the cases following it, 'were distinct authorities that, where a husband covenants to leave, or to pay at his death, a sum of money to a person who. independent of that engagement, by the relations between them and the provisions of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that.' It has been argued, however, that, though this is the rule as to a gross sum, yet the case of a covenant to pay an annuity stands upon different grounds, and is governed by a different principle. Upon this point, *Couch* v. *Stratton* (*supra*) is relied upon. I cannot understand why the rule. which is applied in the case of a gross sum, should not also be applicable to an annuity." The Vice Chancellor followed *Couch* v. *Stratton* and decided that the widow's share was not to be taken as a performance of the covenant to leave an annuity, either wholly or *pro tanto*.

These cases depended entirely upon the implication to be drawn from the marriage settlement. A gift of a gross sum must be presumed to be in satisfaction wholly or *pro tanto* of the widow's share: a gift of an annuity is not so presumed. It is in either case merely a matter of presumption and either presumption can be overthrown by express words in the settlement.

Slatter v. *Slatter* 1 Y. & C. Ex. 28 was also referred to. In that case there was a proviso in a separation deed that the husband should be indemnified out of the annuity against the debts and contracts of his wife and thirds at common law or by custom which she at any time thereafter might claim, and a covenant by the wife to make and execute all such acts, assurances. matters or things as should be requisite for barring her right to thirds at common law. The Lord Chief Baron expressed his opinion to be that there was nothing in the deed to deprive the wife of any interest to which she was entitled in the personal estate of her late husband. No reasons for the judgment are given, but I suppose one or more of the arguments on behalf

of the wife were adopted—that the deed was not binding on her as a married woman could not contract except as to her separate property—that the deed, if binding, was rendered null and void by the parties resuming cohabitation—that the deed bore internal evidence that it was not considered binding on the wife—that the reference to thirds at common law did not include a share under the Statute of Distributions.

This case was relied upon by the appellant in *Gurly* v. *Gurly* 8 Cl. and Fin., 743, but was not applied by the House of Lords. In this case the Lord Chancellor having quoted from the settlement in the case before him "the provision so made shall be paid to her in full lien, bar and satisfaction of any thirds which she could or might claim at common law" proceeded:

"It appears to me, that by these expressions it was intended that the wife should, in respect of the sum thus secured to her, discharge from all claim of hers every part of the estate of her husband, and that the sum and property so settled should be taken in lieu of such claim. I am therefore of opinion, consistently with the judgment of the Lord Chancellor in the Court below, that this settlement was meant to bar the intended wife of all claims which she might set up against the real or personal estate of the gentleman whom she was about to marry."

In the case before me the gift of the $300 and $150 must be coupled with the words "she has no more interest in my property (estate)." The reference to "executors" "after my death" clearly indicate that what was referred to was the estate in the hands of the executors after Ena Mohamed Tamby's death. The gift coupled with the words of deprivation are amply sufficient to bar Oomah's claim to the widow's one sixth share and I do not see how the throwing in of an extra gift of maintenance during widowhood should have the effect of re-conferring upon her the sixth share of which it was a purpose of the marriage agreement to deprive her. I think the two covenants are separate and distinct and that the effect of the latter is not to nullify the former especially having regard to the subsequent disinheriting clause.

The marriage agreement has been treated as one made in contemplation of marriage. It was made immediately after—almost as part of the marriage ceremony. Possibly it was a reduction to writing of an agreement made before the ceremony. In any case Oomah seems to have been a party to it. There was valuable consideration for her accepting her exclusion from her widow's sixth share as by the agreement the husband barred himself of his freedom to dispose of his whole estate by will to the total exclusion of Oomah.

In my opinion Oomah is not entitled to a widow's one sixth share in this estate. The second question propounded therefrom does not arise. She is entitled to $156 being maintenance for the two years during which she remained the widow of Ena Mohamed Tamby.

Solicitors for all parties—*Drew & Napier.*

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